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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 514

STATES STEAMSHIP COMPANY,

Petitioner.

—versus—

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE CO., PACIFIC NATIONAL FIRE INSURANCE CO., and THE DOMINION OF CANADA,

Respondents.

BRIEF OF ATLANTIC MUTUAL INSURANCE CO. AND PACIFIC NATIONAL FIRE INSURANCE CO. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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While this case is of obvious importance to the parties it is of no importance to anyone else. The only principles of law which the case presents are well established in all the circuits which deal with Admiralty causes.

A

The loss of the S.S. "Pennsylvania" did not result from a sea peril but from her own unseaworthiness existing by reason of petitioner's lack of due diligence

The petitioner urges in its petition (at p. 6) that a storm of great violence caused the loss of the

nsylvania." However, the District Court (Appendix B, Findings III to VI, 5a-6a)* and the Court of Appeals (Appendix C, 12a-15a, 17a) found concurrently that her loss did not result from a sea peril but from her unseaworthiness which existed through lack of due diligence.

The District Judge, resident in Arizona, was sitting temporarily in the District of Oregon. In his memorandum opinion he said, as quoted at page 10 of the petition, "Those charged with her inspection owed the care of reasonable and prudent persons * * *." Also, he commented in that memorandum (Appendix C, 14a) that the defect in the ship which caused her loss may have been "latent". This, also, is emphasized in the petition (at p. 10). However, the memorandum was loosely worded and in the District Court's formal findings it was set out (Appendix B, Finding VI, 6a) that the petitioner had not established that it had exercised due diligence in relation to the unseaworthiness which caused the loss of the vessel and for that reason the Court concluded (Conclusion 1) that the petitioner was not entitled to exoneration from liability. No suggestion of a latent defect appears in the Findings. In the Ninth Circuit the formal findings are controlling rather than a prior informal memorandum. *Oaksmith* v. *Garner*, 205 F. (2d) 262 at pp. 266-7. That is also the rule in other circuits.

In setting out the provisions of the Carriage of Goods by Sea Act—at page 4 of the petition—unfortunately there is omitted the important provision

* References in this brief to Appendices are to those attached to petition.

appearing at the end of 46 U. S. C. par. 1304 (1): "Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.")

In all three of its opinions the Court of Appeals found that there was ample evidence supporting the finding of the District Court that the unseaworthiness of the "Pennsylvania" which caused her loss resulted from lack of due diligence (1st Opinion, Appendix C, 17a; 2d Opinion, Appendix D, 20a, 33a; 3d Opinion, Appendix E, 37a, 41a).

B

The petitioner is not entitled to limitation of its liability

So far as concerns limitation of liability, the law is clear, as the Court of Appeals held (Appendix, E, 42a), that the vessel owner seeking limitation must prove its lack of privity with or knowledge of the cause of the disaster which has established its liability. *Coryell* v. *Phipps*, 317 U. S. 406 at p. 409.

Finding in general terms that lack of due diligence required the conclusion that the petitioner was liable for the loss of the cargo of the "Pennsylvania," the District Court made no finding as to which of the petitioner's representatives was negligent. It found also in general terms (Appendix B, Finding VII, 6a) that "the unseaworthy condition of the vessel at the inception of her voyage was without the privity or knowledge of petitioner * * *."

The Court of Appeals found in its second and third opinions that the petitioner's representatives who were in privity with sending the "Pennsylvania" to sea in an unseaworthy condition, were its managing officers and that their privity necessarily defeated the petitioner's right to limitation of liability (Appendix D, 23a, 25a-26a; Appendix E, 41a-42a).

The Court of Appeals did not disregard the decision of this Court in *McAllister v. The United States*, 348 U. S. 19, as argued by the petitioner (at pp. 15-19). The Court cited that case (Appendix D, 26a), recognized its principle and applied it. In its second and third opinions the Court of Appeals corrected the erroneous conclusion set out in its first opinion, so far as concerns limitation of liability. It determined unanimously that correction was required because it became convinced that its prior conclusion and that of the District Court were clearly erroneous so far as concerns limitation of liability (Appendix D, 20a, 23a-34a; Appendix E, 38a-42a).

The Court of Appeals did not hold (as is argued by petitioner at pages 19 et seq.) that lack of due diligence invariably involves a vessel owner's privity and knowledge. It specifically held to the contrary (Appendix E, 38a). Here petitioner's managing officers were in privity with sending an unseaworthy vessel to sea. Not only was there no evidence establishing their ignorance of the unseaworthiness but there was positive evidence that they were familiar with the vessel's condition.

The case presents no issue of delegation of responsibility as argued in the petition (at pp. 20-21). Here

the responsibility was not delegated: it was negligently borne by petitioner's managing officers. It is true (as argued at pp. 20-24) that negligence of a vessel owner's inferior servants may establish its liability without defeating its right to limitation but that principle has no application here.

The discussion at pages 25-29 of the petition is not of any legal principle: it is primarily an argument that the courts below were in error in their concurrent findings that the "Pennsylvania" was unseaworthy through lack of due diligence.

C

The case presents no conflict between circuits concerning any legal principle nor any issue of public interest

We find strange indeed the argument (at p. 27) that this Court should review this case because the owner of another welded vessel—the "Christer Salen"—was held exempt from liability in another circuit on different evidence. That vessel fractured under entirely different circumstances. There the decision of the Court of Appeals, as in the instant case, was based upon findings of fact of the District Court. In any event the petitioner misconceives, we think, the basis for the granting of petitions for certiorari because of a conflict between circuits. When there is such a conflict we understand that this Court may decide to grant a petition if a legal principle involved in the conflict is of substantial importance. Here the argument is that in *Peter Paul, Inc.* v. *Rederi A B*

Pulp, 258 F. (2d) 901, the Court of Appeals for the Second Circuit gave more weight to an inspection certificate than did the Court of Appeals in the instant case.

We find ourselves unable to perceive the competency or the relevancy of the assertions (set out at pp. 31-32 of the petition) that there has been critical discussion of the decision in the instant case in various non-legal publications which are said to be "leading journals" but with which we are not familiar; nor of the asserted off-hand comments of a lawyer interested in the adoption of a proposed international convention. As the record of the case presents no issue which is of importance except to the parties, it is apparent that this extraneous unproven matter is added in an effort to establish a public interest in the hope that this may in some way be helpful in securing a review by this Court.

Respectfully submitted,

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